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IN THE

# Supreme Court of The United States

OCTOBER TERM, [redacted] 1969

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No. [redacted] 246

SAMUEL EUGENE PATTERSON,
*Petitioner,*

v.

STATE OF INDIANA,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

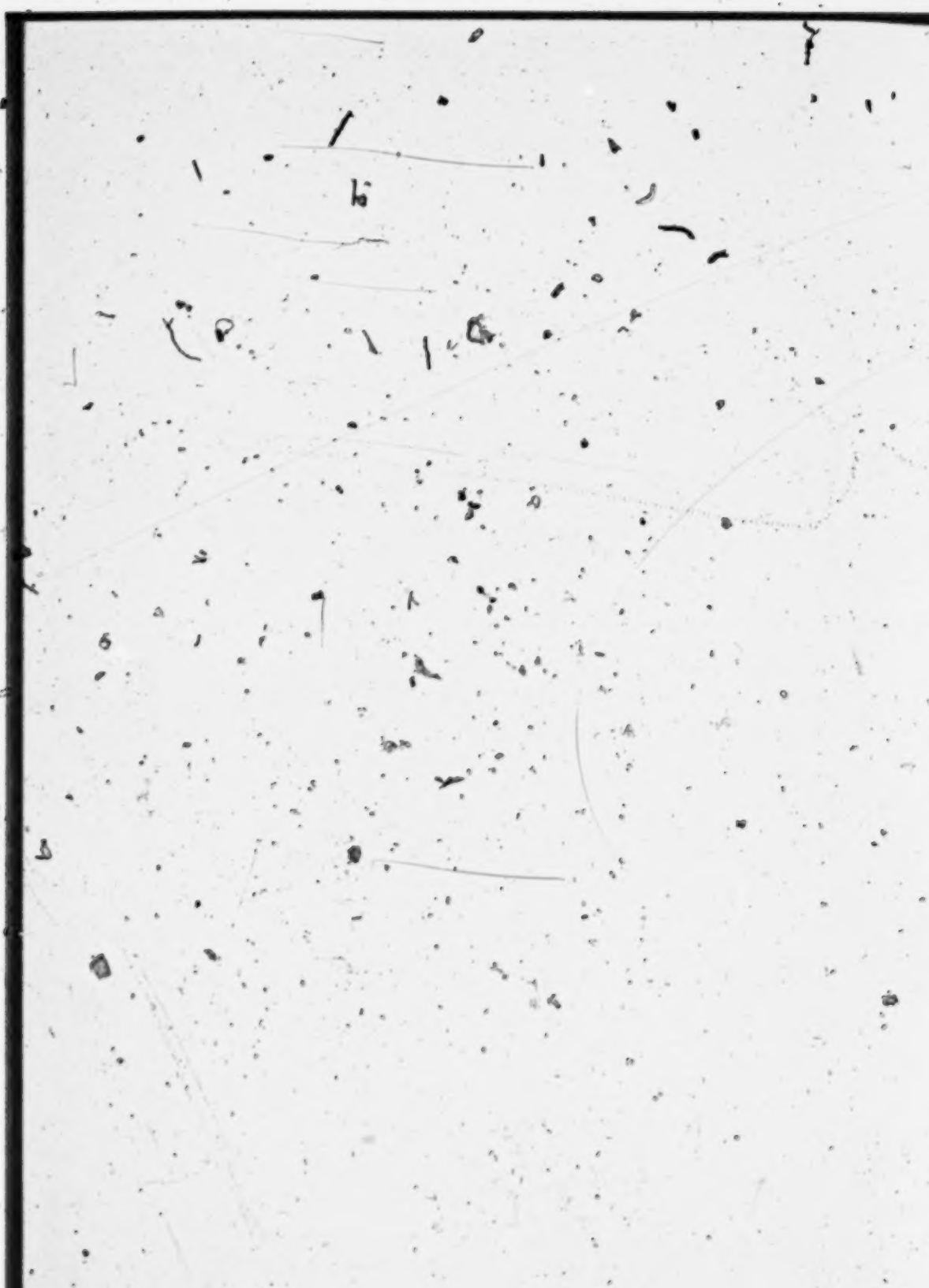
## BRIEF FOR RESPONDENT IN OPPOSITION

THEODORE L. SENDAK
*Attorney General of Indiana*

WILLIAM F. THOMPSON
*Deputy Attorney General*
*Attorneys for Respondent*

219 State House
Indianapolis, Indiana
317-633-5512

C. E. Pauley & Co., Inc., Indianapolis



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## BRIEF FOR RESPONDENT IN OPPOSITION

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### OPINION BELOW

The opinion of the Supreme Court of Indiana appears as *Patterson v. State*, 244 N.E.2d 221 (1969).

### JURISDICTIONAL STATEMENT

Respondent concurs in the jurisdictional statement set forth in the petition for writ of certiorari.

### QUESTION PRESENTED

Whether, in a state criminal proceeding, the due-process clause of the Fourteenth Amendment to the Constitution

of the United States compels a prosecutrix-prostitute to undergo a psychiatric examination prior to the trial of, and upon the demand of, her pimp.

## CONSTITUTIONAL PROVISION INVOLVED

" . . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . ." *Fourteenth Amendment, Constitution of the United States,* § *1.*

## STATEMENT OF THE CASE

Pending disposition of the petition for writ of certiorari, respondent concurs in petitioner's statement of the case.

## ARGUMENT AGAINST GRANTING THE WRIT

### I.

### Adjective Perspective

A. *Backward through the prism of lower-court analyses.*

The germinal influence in our jurisprudence upon the problem presented by this petition for certiorari undoubtedly is Wigmore's great treatise. Writing in 1940, Wigmore opined: "*No judge should ever let a sex-offence charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician, . . .*" *3 Evidence,* (3rd Ed.) § 924*a*, p. 460, and Wigmore thought highly-enough of his point to italicize it in the original. This viewpoint stems from our knowledge that certain sex crmes, *e.g.* rape, whether forcible, or consentual but violative of statutes enacted for the protection of young women, are likely to be clandestine happenstances, a viewpoint inherited from the mother country *per* Lord Chief Justice Hale, who more than 300 years before Wigmore wrote that rape "is an accusation easily

to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." 1 *Pleas of the Crown* 634 (1630).

*Post* Wigmore, the matter for the most part was left to percolate through the legal trade-periodicals until 1966, when it was spread before the Supreme Court of California: *Ballard v. Superior Court of San Diego County*, 64 Cal.2d 159, 49 Cal. Rptr. 302, 410 P.2d 838, 18 ALR 3d 1416 (1966). The facts involved a physician, who was accused of rape in that he had nonconsentual relations with his female patient after administering to her an anesthetizing substance to negative her resistance. Prior to trial, defendant moved the court to order a psychiatric examination of the prosecutrix, in the nature of a discovery procedure, "for the purpose of determining whether her mental or emotional condition affected her veracity." 410 P.2d at 846. The trial judge concluded he had not the power to so order, whereupon the defendant sought above a mandate as of right, to the opposite effect. The Supreme Court of California refused mandamus, but also rejected the trial court's conclusion that it lacked power to grant defendant's motion, to wit (410 P.2d 849):

> We therefore believe that the trial judge should be authorized to order the prosecutrix to submit to a psychiatric examination if the circumstances indicate a necessity for an examination. Such necessity would generally arise only if little or no corroboration supported the charge and if the defense raised the issue of the effect of the complaining witness' [sic] mental or emotional condition upon her veracity.[1] Thus, in rejecting the polar extremes

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[1] Flag this sentence, for in its *ad hoc* attempt to formulate criteria for the exercise of judicial discretion, its language raises some procedural problems discussed *infra*, Point II.

of an absolute prohibition and an absolute requirement that the prosecutrix submit to a psychiatric examination, we have accepted a middle ground, placing the matter in the discretion of the trial judge.

Once grounds for the exercise of judicial discretion are announced to exist, who is entitled to invoke it? Surely within its umbra are the accused rapist, seducer, or sodomite. But is there a penumbra to cover the less-than-clandestine activities, such as here, of a pimp? And who may be called to examination? Clearly, when merited, a prosecutrix; but what of a state's rebuttal witness who is not a prosecutrix, a fact-situation far from hypothetical, see *People v. McIntyre,* 256 Cal.App.2d 894, 64 Cal. Rptr. 530 (4th Dist. 1968)?

The only other jurisdiction to marinate this problem extensively in its appellate judiciary is, coincidentally enough, Indiana. See *Annot.,* 5 ALR 3rd 1433, 1441-43 (1968). A rough synthesis of the cases reveals: In *Burton v. State,* 232 Ind. 246, 111 N.E.2d 892 (1953), a closely-divided court reversed, as not proven beyond a reasonable doubt, a father's conviction for sodomy alleged performed with his young daughter. While quoting extensively from Wigmore's view of the efficacy of psychiatric examinations for youthful prosecutrices, the opinion did not mandate such examination as a concomitant of the new trial. And *cf. Harvey v. State,* 232 Ind. 574, 114 N.E.2d 457 (1953), upholding a conviction of rape upon a 13-year-old prosecutrix, where the evidence supported it, and without a psychiatric examination, recognizing exactly what the *Burton* breakthrough was—and was not—intended to accomplish. At this point, a strange turn:[2] *Wedmore v. State,* 237 Ind. 212,

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[2] In more ways than one; for the first time, the Indiana Supreme Court began discussing a psychiatric examination vis-á-vis the prosecutrix's *competency,* a dangerous mis-analysis (which still persists) discussed in detail in Point II, *infra.*

143 N.E.2d 649 (1957), purports to overrule *Burton* insofar as it ". . . purports to require that in any sex case the complaining witness be required to be examined, before testifying, by a psychiatrist for the purpose of examining her social history and ascertaining her probable credibility, the report of such examination to be reported in evidence . . . ," something far removed from what *Burton* purported to do in the first place. There was some further rumination in the opinion to the effect that, in the absence of statute, no judicially-created obligation could fasten on the State *ab initio* to furnish a psychiatric examination of the prosecutrix in a sex case. One immediate consequence of all this was to turn the Supreme Court of California, which had looked to our cases for help, right around, for that Court observed, *Ballard v. Superior Court of San Diego, supra* n. 13: "[W]e find no indication that the trial courts of Indiana may not order the examination in proper circumstances." Later Indiana cases shake the validity of this conclusion, see, *e.g., Lamar v. State,* 245 Ind. 104, 195 N.E.2d 98 (1964), and *De Bruler v. State,* 247 Ind. 1, 210 N.E.2d 666 (1965), culminating in an implication, *Binder v. State,* — Ind. —, 221 N.E.2d 886 (1966) (*criticized,* 44 Ind. L.J. 106 (1968)) that, in the absence of statutory enactment, concerning a motion on *anybody's* part for pre-trial psychiatric examination of a sex-crime prosecutrix, it can't happen here.

The Federal experience has not been extensive, possibly inhibited by a well-known admonition against the "fog-enshrouded sea of psychiatry," *United States v. Flores-Rodriguez,* 237 F.2d 405, 412 (2d Cir. 1956) (concurring opinion *per* Frank, J.), which possibly motivated opinions such as: "Submission of the case to the jury was amply warranted by the evidence. Examination of the prosecutrix by a doctor or a psychiatrist was not a pre-requisite to such

submission." *Straight v. United States,* 263 F.2d 811, 814 (9th Cir. 1959).

Nor has the Federal experience been advanced by *United States v. Dildy,* 39 F.R.D. 340 (D.C.D.C. 1966), in which the trial judge refused to grant defendant's pre-trial motion for a psychiatric examination of a prosecutrix who alleged incest. The trial court reasoned that while F.R.Civ.P. 35 permits mental examinations in civil actions, omission of a counterpart provision from the Federal Rules of Criminal Procedure operated as a prohibition against granting defandant's motion. Policy considerations also were discussed.

About six weeks after the opinion issued in *Dildy, supra,* this Court amended F.R.Cr.P. 16,[3] which now provides: "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant * * * (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case . . . the existence of which is known . . . to the attorney for the government . . ." Concededly, this language will not support a pre-trial order for a psychiatric examination. The language merely implements discovery rather than mandating creation. See Advisory Committee's Note, 39 F.R.D. 176, *but cf. Dennis v. United States,* 384 U.S. 855, 871, text accompanying n. 17 (1966), and compare *United States v. Simon,* 262 F. Supp. 64, 73 (S.D.N.Y. 1966) with *United States v. Westmoreland,* 41 F.R.D. 419, 424 (S.D. Ind. 1967). However, it *is* arguable that, where operable, the new criminal provision has wider scope that its civil counterpart. Rule 35(a), F.R.Civ.P., does not operate until the matter sought to be the subject of the pre-trial psychiatric examination is "in controversy," *Schlagenhauf*

[3] Over two dissents, see particularly Mr. Justice Douglas's remarks dissenting from the amendment of F.R.Cr.P. 16, at 39 F.R.D. 276.

*v. Holder,* 379 U.S. 104, 118-22, (1964), whereas the counterpart criminal rule arguably permits discovery of the results of a pre-trial psychiatric examination held merely "in connection" with the particular case.

B. *Forward through reform in the law.*

Since the Supreme Court of Indiana handed down its decision below in this case, agitation for state-law reform by the bench and bar in this corner of the criminal law has borne fruit with the publication of ABA STANDARDS, DISCOVERY AND PROCEDURE BEFORE TRIAL (Tentative Draft, May, 1969).[4] The standards of criminal discovery therein, so far as pertinent here, follow closely the federal rule discussed above, *compare* F.R.Cr.P. 16(a)(2) *with* STANDARDS, § 2.1(a)(iv), particularly, the limitation "in connection with the particular case." Advisory Committee Comments, STANDARDS, 67. The rule of *Brady v. Maryland,* 373 U.S. 83 (1963), has not only been codified, STANDARDS § 2(c), but has been expanded to apply pre-trial, Advisory Committee Comments, 73.

Quite novel, in contrast to the federal rule, the prosecution on its own initiative ". . . as soon as practicable following the filing of charges against the accused," would tender certain specified information to defense counsel, eliminating the latter's necessity to move in order to obtain it, STANDARDS, § 2.2. Reciprocal discovery in favor of the prosecution is preserved, *compare* F.R.Cr.P. 16(c) *with* STANDARDS, § 3.2. While, as in the federal procedure, there is no machinery to *compel* a pre-trial psychiatric examination, STANDARDS does preserve the trial court's power to cover such an examination with a protective order, *compare*

[4] American Bar Association Project on Minimum Standards for Criminal Justice, Recommendations of the Advisory Committee on Pretrial Proceedings, Alfred P. Murrah, Chairman, referred to hereinafter as STANDARDS.

F.R.Cr.P. 16(e) *with* STANDARDS, § 4.4. This procedure could light the way for discretionary examinations protected by judicial order:

> Since it is also clear that disclosure of such information necessary for a fair trial would take precedence over the interests of protecting the Government and third parties, the question is no longer one of whether such discovery should be permitted, but rather of the manner in which discovery should be conducted in order to minimize the danger of abuse. It is possible that the protective order would provide both an appropriate and convenient instrument in achieving this end.

Comment, *Federal Rules of Criminal Procedure* (tentative), 113 U.Pa.L.Rev. 1295, 1303 (1965).

Even though reform of state criminal adjective law is on the way, no matter their clarity, finally, proof of rules of law in the air, so to speak, will not do. There must coexist procedures, albeit shaped by the particular rule of law involved, for that rule's application. The competent formulation of such procedures applying the rule of adjective law claimed in this case is a separate problem to which we now must turn.

## II.

### Competence and Discretion in State-Formulated Modes of Adjective Law Application

As is almost inevitable in the process of fashioning new rules of adjective law, the tentative ventures into the area are likely to produce a fuzzy vision of exactly what is—and is not—at stake in the matter. Also unsurprisingly, these preliminary viewpoints likely have procedural ramifications as well. This is true of the instant case.

The primary thrust of a motion for pre-trial psychiatric examination of a sex-crime prosecutrix is to discover whether grounds exist for the impeachment of her subsequent trial testimony, on the grounds of its incredibility, by the accused.[5] 3 Wigmore, *Evidence,* (3rd Ed. 1940) § 934a p. 485. Even Wigmore himself was a little shaky on the point; the quotation which opens this brief appears under the subheading: "§ 924*a* **Same: Woman Complainant's Chastity in a Charge of Sexual Crime.**" Yet this is somewhat by the mark; the female complainant, of whom a pre-trial psychiatric examination is sought, may be chaste as Artemis, but a weaver of dreams about an innocent man. So too, that portion of the opinion below which dealt with the point opined, *en toto:*

> It is also argued under Point 3 that the court erred in overruling a motion to have a psychiatric examination of Judy Kay Vickery, a prosecuting witness. However, the briefs do not set forth at any point that any objection was made to the witness testifying on the ground that she was mentally *incompetent* as a witness when she took the stand. Therefore we find no point raised for our consideration with reference to the testimony of Judy Kay Vickery (emphasis supplied).[6]

*Patterson v. State,* 244 N.E.2d 221, 222 (1969). This breaks no new ground, inasmuch as the restatement of *Wedmore v. State, supra,* by *Binder v. State; supra,* noted at 211

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[5] Occasionally the pre-trial examination may net the bigger fish, namely, a prosecutrix whose mental condition reveals a pathology so serious it would prevent her from even testifying. This result yields grounds for objecting, should she mean to take the stand at trial, to her *competency* even to testify. This half of this distinction is discussed in Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach,* 48 Cal.L.Rev. 648, 650 (1960). Cf. *Curry v. State,* — Ind. —, 248 N.E.2d 30 (1969) (semble).

[6] *Compare* considerations governing review on certiorari, Sup.Ct. Rule 19.1(a).

N.E.2d 887: "In that case [Wedmore] the motion for a psychiatric examination was made at the beginning of the trial. It was an attack upon the *competency* of the witness." (emphasis supplied) Unless the language of these cases is announcing, *sub silencio*, a procedural departure from the mainstream of trial and evidential procedure as we know it (which only subsequent cases *aluinde* can tell us) this language, like Wigmore's *supra*, does not focus squarely with things as they are.

Assuming the primary purpose of a pre-trial psychiatric examination is to supply ground for the subsequent impeachment at trial of the prosecutrix's *credibility*, an at-trial objection to her *competency* to testify will be usually—though not always—by the point. And in any event, grounds for objection to her competency probably will stem from the results of the differently-motivated pre-trial examination.

Therefore, as a matter of convenience, a pre-trial procedure seems the more feasible way to handle this problem, particularly in view of the current judicial preference for clearing away collateral underbrush before waging substantive battle. See Advisory Committee Comments, STANDARDS, 115-120. And possibly this motion for psychiatric examination *must* be made pre-trial under penalty of waiver, STANDARDS, § 5.3(b). *Cf. People v. Morales*, 254 Cal.App.2d 194, 61 Cal.Rptr. 764, 767-68 (2nd Dist. 1967).

Once an examination has been held, problems remain over utilization of its product. The California Supreme Court in *Ballard, supra*, opined that the examination would be required if 1) the defense raised the credibility issue vis-á-vis the prosecutrix's emotional state and 2) the lack of evidence to corroborate the prosecutrix's story[7] war-

[7] If this is to be the criterion, then the judgment of the Hamilton County Superior Court below on the merits clearly was correct, in view of the extensive corroborative evidence in this record.

ranted such an examination. Surely the California court did not envision trial stoppage at the close of an uncorroborated State's witness so she could then undergo a psychiatric examination. A possible middle ground, assuming the California criteria, would be, in cases where the examination is held pre-trial, to surround the examination's results by judicial order, with the results to become admissible—or perhaps even only available[8]—to the defense depending upon how weightily the State's case unfolds.

Further, who is to select the examining psychiatrist; the defense? The defense acting in accord with the prosecution?? The Court itself??? If the examination results are sought to be introduced, must the examining physician, if available, himself testify?[9] Or will his mere evaluations, if reduced to exhibit form, suffice?? Or are these two means of challenging the prosecutrix's credibility to be evidentially fungible???

Finally, petitioner seeks to superimpose a mandate of Constitutional Law upon this problem of the administration of an adjective principle of criminal law, while the contours of both the problem and its possibly-viable solutions still shimmer in uncertainty. It is time to turn again.

## III.

### Of Time and Due Process

In contrast to his argument that as a matter of the administration of state criminal justice, petitioner's motion for a pre-trial psychiatric examination of a sex-crime prosecutrix should be granted, which has as its distinguish-

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[8] *Cf.* 18 U.S.C.A. § 3500(b) (The Jencks Act).

[9] See petitioner's "Verified petition [for] psychiatric examination," Para. 4 (Tr. 45).

ing characteristic the varying problems attending any evolving legal innovation, his argument that his motion lies of right—because it is required by no less than the due-process-clause of the Fourteenth Amendment to the United States Constitution—is outstanding because of the rapidity with which it expects an adjudication of Constitutional Law principle.

Just three years ago, the Supreme Court of California was gestating the legal principle involved here, not to mention its modes, once born, of application. Simultaneously, this Court was at least implicitly recognizing these emerging problems by its amendatory language of F.R. Cr.P. 16(a)(2). Cases on point since then, state and federal, have been few, although, as noted in its recently-published STANDARDS, the profession's leading organization has been skirmishing at least around the periphery of the problem. Yet today this petition seeks a Constitutionally-mandated answer "yes" to its question—full, flat, and presumably operative for all time.

Compare the nearly half-century of judicial contemplation needed to harden the search-and-seizure thinking of *Weeks v. United States*, 232 U.S. 383 (1914), into the rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), a process which left as a casualty by the wayside one of the grandest opinions (which is not to say holdings) in all our jurisprudence, *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926). Why, our Constitutional Law abounds with examples of the time and thought necessary to forge a universally-applicable due-process principle. To cite only some others among the famous: Compare *Johnson v. Zerbst*, 304 U.S. 458 (1938) with *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); compare *Rosen v. United States*, 245 U.S. 467 (1918) with *Washington v. Texas*, 388 U.S. 14 (1967) (right to accomplice testimony); compare *Wilson v. United*

*States*, 149 U.S. 60 (1893) with *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Griffin v. California*, 380 U.S. 609 (1965) (right to silence with no comment thereon); and consider concomitantly, *de mortuus, Betts v. Brady*, 316 U.S. 455 (1942); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Twining v. New Jersey*, 211 U.S. 78 (1908); and *Adamson v. California*, 332 U.S. 46 (1947); as well as *People v. Defore, supra.* Most spectacularly, compare the effect of *Benton v. Maryland*, 37 U.S. Law Week 4623 (June 23, 1969), and its sibling cases upon that heretofore Constitutional linchpin, *Palko v. Connecticut*, 302 U.S. 319 (1937), which, however startling, cannot fairly be said to be completely surprising, see *Benton v. Maryland*, 392 U.S. 925 (1968) (memorandum opinion).[10]

Even if it is decided to by-pass the lower federal courts as the natural incubator for this new practice rule either for the administration of criminal justice—or of embryonic Constitutional Law—which the lower federal courts themselves have heretofore refused to entertain, *United States v. Dildy, supra; Straight v. United States, supra,* other problems appear. Should this new practice rule apply retroactively?[11]

If this Court now promulgates through the land such a new practice rule, arguably retroactive it should be. This is because the prosecutrix's testimony in a sex-crime case is an omnipresent and powerful weapon for conviction in the accuser's armory. The question whether her word alone, standing uncorroborated, suffices to support such a conviction could fill law books, and has; see *Annot.*, 60

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[10] But *cf. Gideon v. Cochran*, 370 U.S. 908 (1962) (memorandum opinion), which put *Betts v. Brady, supra,* in jeopardy *by name.*

[11] And, if applicable, retroactively from when? Compare, *e.g. Linkletter v. Walker*, 381 U.S. 618 (1965) with *Stovall v. Denno*, 388 U.S. 293 (1967).

A.L.R. 1124 (1929), and the myriad cases supplementing it. The argument, put most trenchantly:

> When such a new higher level is established as the current standard, there is certainly substantial justification for the position that no one shall thereafter be kept in prison of whom it has not been established by processes embodying essentially that new degree of probability that he is in fact guilty. Valuing the liberty of the innocent as highly as we do, earlier proceedings whose reliability does not measure up to current constitutional standards for determining guilt may well be considered inadequate justification for continued detention. For to continue to imprison a person without having first established to the presently required degree of confidence that he is not in fact innocent is indeed to hold him . . . "in custody in violation of the Constitution. . . ."

Mishkin, *Foreword—The Supreme Court 1964 Term*, 79 Harv. L. Rev. 56, 81-82 (1965); contra, *Case v. Nebraska*, 177 Neb. 404, 129 N.W.2d 107, *vacated per curiam*, 381 U.S. 336 (1965) (Clark and Brennan, JJ., concurring).

To the difficulties involved in state court nourishment of this recently-born rule of adjective law, plus the inherent difficulties attendant upon fashioning viable procedures for its implementation, this petition prematurely adds the further problems of formulating and administering a principle of Constitutional Law, without the benefit of adequate prior consideration of these problems by the lower courts of our Federal system. Thus the totality of the jurisprudential circumstances presented by this petition for certiorari argues that its proper disposition is its denial. The most succinct argument applicable here was given by Mr. Justice Frankfurter, on one of those rare occasions when he amplified his reasons for declining to decide another allegedly Constitutional question, *Maryland v. Baltimore*

*Radio Show,* 338 U.S. 912, 918 (1950) (denying certiorari): "Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening. . . ."

## CONCLUSION

Wherefore respondent prays that the petition for writ of certiorari to the Supreme Court of Indiana be denied.

Respectfully submitted,

THEODORE L. SENDAK
*Attorney General of Indiana*

WILLIAM F. THOMPSON
*Deputy Attorney General*
*Attorneys for Respondent*